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Ontario Labour Relations Board HIGHLIGHTS

Editors: Voy Stelmaszynski, Solicitor
Leonard Marvy, Solicitor

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NOTICE TO THE COMMUNITY

Please see the attached Notice regarding the upcoming increase to construction industry grievance filing and hearing fees.

SCOPE NOTES

The following are scope notes of some of the decisions issued by the Ontario Labour Relations Board in March of this year. These decisions will appear in the March/April issue of the OLRB Reports. The full text of recent OLRB decisions is now available on-line through the Canadian Legal Information Institute www.canlii.org.

Employer – Interim Relief – Unfair Labour Practice – A number of Labour Ready employees were laid off from the construction of a solar farm – One issue in dispute was the identity of the proper employer of the laid-off employees, but that issue did not have to be determined for purposes of the request for interim relief (the responding parties were deemed "co-employers" for the interim relief application) – A second issue was whether there was a campaign to establish bargaining rights "underway," since an application for certification had already been filed – The Board held that as long as there are outstanding issues related to the certification still to be determined by the Board, a union's campaign for bargaining rights remains underway – Section 86(2) is recognition of a union's presence in a workplace subsequent to an application for certification, but prior to a certificate being issued – The other criteria of s. 98(2) and (3) having been met, interim relief was granted

224556 ONTARIO LIMITED C.O.B. AS AGT SOLAR ET ALL; RE: The Carpenters' District Council of Ontario, United Brotherhood of Carpenters and Joiners of America; OLRB File No. 3310-13-M; Dated March 18, 2014; Panel: Lee Shouldice (27 pages)

Construction Industry Grievance – Evidence – Practice and Procedure – The employer challenged the sufficiency of the pleadings in the union's grievance referral – The Board held that although its Rules have no application to the level of factual disclosure of a grievance delivered by a union to an employer, Rules 5.1 and 7.1(d) do establish standards of pleading with respect to the referral of that grievance to the Board – In this case, the union's failure to furnish material facts until one week before the hearing (and three months after the events underlying the grievance) undermined the purpose of the grievance and arbitration procedure, namely the early resolution of disputes regarding the interpretation of the collective agreement – Grievance referral dismissed

614128 ONTARIO LTD. O/A TRISAN CONSTRUCTION AND/OR AQUAVAC; RE: Labourers' International Union of North America, Local 183; OLRB File No. 2620-13-G; Dated March 14, 2014; Panel: Lee Shouldice; R. O'Rourke and A. Haward (10 pages)

Employment Standards – Parties – Abava sought review of an Order to Pay – The issue before the ESO was whether Abava or 6228704 Canada was the claimant's employer – The Director of Employment Standards asked the Board to add the numbered company as a party to the application for review – The Board recognized earlier jurisprudence holding there may be prejudice suffered where a party is sought to be added to an application for review and that party has not been given the opportunity to participate in the ESO's investigation – However, in the case at hand, the Board noted the numbered company did have the opportunity to participate in the ESO's investigation; thus, it could not be said that the numbered company was unaware of the issues at hand or would have an inability to know the case it has to meet – The Board recognized that if the numbered company were *not* added as a party and the Board held the ESO's determination was incorrect, the claim would go unpaid, as the Board would not be in a position to issue an order against a non-party and the time limit for initiating a fresh claim against the numbered company would have elapsed – The Board held this was an appropriate case to exercise its discretion to add a party, and stated that "[i]n the circumstances in which an ESO must determine which of two entities is an individual's employer, the entity that is successful before the ESO should not be insulated from being found to be the employer in a subsequent application for review just because the Board's normal practice is to name only the applicant employer, the claimant employee and the DES as parties to such an application for review" – Matter proceeds

ABAVA LTD.; RE: Barry Cleary; RE: 6228704 Canada Limited; RE: Director of Employment Standards; OLRB File No. 1247-13-ES; Dated March 7, 2014; Panel: Roslyn McGilvery (5 pages)

Bargaining Unit – Certification – Construction Industry – The Board considered whether it is appropriate to permit a displacing union to seek to represent employees in a single Board Area when they are covered by a non-ICI province-wide collective agreement with the incumbent – The Board held that the disruption caused by having a different bargaining agent displace, in a single geographic area, an incumbent union that has province-wide bargaining rights is not, in and of itself, unacceptably disruptive – But that is only one factor to consider in the context of such an application – Other considerations include tolerance for fragmentation and the age of the bargaining relationship – Matter continues

BROOK RESTORATION LTD.; RE: Labourers' International Union of North America, Local 1081; RE: Operative Plasterers' and Cement Masons' International Association of the United States and Canada, Local 598; OLRB File No. 0340-13-R; Dated March 18, 2014; Panel: David A. McKee (8 pages)

Discharge – Health and Safety – Reprisal – The applicant complained that his discharge was motivated by the exercise of rights under the OHSA – The Board extensively documented the parties' respective positions in emails, descriptions of meetings, etc during the employment relationship – The Board observed that the exercise of a right under the OHSA can be considered an act of insubordination in that the employee may be acting directly contrary to the employer's desires or even its commands – The Board held that in the circumstances of this case it was difficult to distinguish the employer's reaction to the unwelcome exercise of a health and safety right from its reaction to how the safety right was being exercised – However, the Board had no hesitation in finding that the applicant had crossed the lines of civility and decorum: he was insubordinate, disrespectful and threatening and, therefore, properly discharged – Application dismissed

CORROSION SERVICES LTD.; RE: Julian Kalac; OLRB File No. 1038-13-OH; Dated March 27, 2014; Panel: Brian McLean (27 pages)

Bargaining Unit – Certification – Employer – The Board addresses the status of a complement of workers brought to work in Canada from Vietnam through an intra-company transfer program – The applicant union sought to have these workers excluded from the applied-for bargaining unit – The employer manufactures wind towers for the solar power generating sector – The Vietnamese workers were brought to Canada to train local employees but, by the time of the hearing of this application, most had been in Canada for over two years because the plant was still not at full capacity – According to all the witnesses, the Vietnamese workers work alongside the domestic employees, performing the same work and reporting to the same supervisors – While their terms and conditions of employment appeared comparable, the Vietnamese workers' schedules and time-tracking were handled differently;

moreover, they received a stipend in Canada but were paid their salaries in Vietnam, and their work terms in Canada were for a finite period, with no future here – Other indicia pointed to CS Wind Canada as their true employer and the Board so held: CS Wind Canada arranged their accommodation, their travel to and from work at the Windsor plant, their meals, work assignments, various cash allowances, and the date they would be allowed to return to Vietnam – On the issue of an appropriate bargaining unit, the Board found that under the circumstances described above, there would be a limited community of interest as between the domestic and foreign workers, so the union should be granted the unit it applied for – Other status disputes remain; matter continues

CS WIND CANADA INC.; RE: International Association of Bridge, Structural, Ornamental and Reinforcing Ironworkers, Local 721; OLRB File No. 2488-12-R; Dated March 25, 2014; Panel: Gail Misra (33 pages)

Employer Initiation – Termination – The Board was asked to scrutinize two payments made to the applicant in and around the time of the filing of the application to terminate LIUNA's bargaining rights – The Board found that the payment to the applicant (a bonus of $5000, 25% of her annual salary, for performing her regular duties of filling empty rental units) and a second payment of $5000 to the applicant's husband (for no ostensible work performed at all) were made by an agent of the employer to finance the application – A subsequent additional payment of $7000 made directly from the employer to the applicant was to cover her legal fees for the decertification application – The employer was unable to rebut the adverse inferences the Board drew about the employer's involvement in the application – Application dismissed

GLENLEIGH HOLDINGS LIMITED; RE: Bernadette Fleischmann; RE: Universal Workers Union, L.I.U.N.A. Local 183; OLRB File No. 2186-12-R; Dated March 13, 2014; Panel: Matthew R. Wilson (13 pages)

Construction Industry Grievance – Discharge – The grievor was discharged by Hydro One following a telephone conversation he had with C, a senior manager – C alleged that the grievor repeatedly swore at him and threatened him during the phone call, stating he was going to "come and get" him – The grievor did not deny swearing at C, but alleged that it was in response to a homophobic statement by C that the grievor's employment was being terminated for taking parental leave – The grievor denied making any threatening statement – The Board noted the decision turned almost entirely on issues of credibility, ultimately finding that C's version was more plausible – Given that the Board concluded the conversation took place as described by C, it had to determine whether the discharge should be upheld on that basis – The Board noted the grievor was clearly insubordinate in making the statements he did to C, however the Board held the following factors mitigated against the penalty of discharge: (i) the comments were made within the context of a telephone call made while the grievor was off duty (albeit in relation to a work related matter); (ii) there was nothing to suggest the grievor's comments were premeditated, rather they were made in the spur of the moment; (iii) the threat could not reasonably be perceived as real and was not perceived as real by C (evinced by the fact that C did not call the police to report the threat; and (iv) the grievor was under stress due to his wife's medical condition, thus was frustrated and merely overreacted – The Board noted it would have found that a two-week suspension was warranted – However, the matter did not end there, as the grievor made serious and inflammatory allegations against C in the grievance referral, allegations which the Board held were unfounded, and he repeated those allegations during his testimony at the hearing – Those factors weighed against mitigation of the penalty – In the Board's view, it was not just and reasonable for the grievor to be awarded compensation for the time he was off work – Therefore, the Board ordered the grievor be reinstated with a two week suspension on his record, with no loss of seniority, but no back pay – Grievance allowed

HYDRO ONE INC.; RE: Canadian Union of Skilled Workers; OLRB File No. 2077-12-G; Dated March 28, 2014; Panel: Ian Anderson (18 pages)

Employer – Employment Standards – Reprisal – G alleged IBM contravened the pregnancy and reprisal provisions of the ESA – G worked for Algorithmics, which was purchased by IBM – IBM determined which employees would be offered permanent employment on the basis of whether the employee performs functions that can be absorbed by IBM's existing organization – It was determined that G's position would be eliminated, thus she was not offered permanent employment – Instead, G received notice from

IBM that she would be made a formal offer of employment for a fixed term with a lump sum to be paid to her at the end of the contract – When G was given the offer letter, the IBM representative was "shocked" to discover G was pregnant – IBM subsequently informed her she should return the letter and a new offer would be made – The new letter offered G employment with IBM for the same fixed term as before, but with specific language acknowledging that she was on maternity leave and the lump sum value increased – G never accepted the offer – IBM then advised her it would extend her benefits on a gratuitous basis during her leave – The Board held the ESA imposes obligations on *employers* and IBM was never G's employer – No contract can be created unless both parties agree, and G did not accept the employment offer – Further, the ESA does not deem the employment contracts between a vendor employer and its employees to continue and to bind the purchaser employer – IBM was not obliged to "reinstate" G to employment after her pregnancy leave ended, because she never enjoyed an employment relationship with it – The Board went on to state that even if IBM had been obliged to abide by section 53 of the ESA *vis-à-vis* G, the Board would have found it did, as the elimination of her position was unrelated to the fact of her pregnancy – The Board also dismissed the reprisal complaint, as section 74 only constrains "employers" – In any event, there could be no reprisal where IBM was unaware of the fact she was pregnant when it made the first offer of fixed term employment – Application dismissed

IBM CANADA LIMITED; RE: Sandra Gonzalez; RE: Director of Employment Standards; OLRB File No. 0475-13-ES; Dated March 18, 2014; Panel: Mary Anne McKellar (8 pages)

Bargaining Rights – Construction Industry Grievance – Carpenters Local 1030 alleged that MTN engaged workers and/or subcontractors contrary to the collective agreement – The CCWU intervened, asserting its members performed the work in question pursuant to a collective agreement it has with MTN – The CCWU secured a certificate from the Board which entitled it to act as the bargaining agent for all construction labourers and carpenters in the employ of MTN in all sectors of the construction industry in Board Area No. 8 – MTN and CCWU subsequently entered into a collective agreement in which MTN recognized CCWU as the bargaining agent for "All its construction employees engaged in highrise concrete forming in the province of Ontario save and except non-working foreman and persons above the rank of non-working foreman" – Subsequently, a voluntary recognition agreement was entered into between MTN and Local 1030, in which MTN recognized the Carpenters District Council of Ontario and Local 1030 as the collective bargaining agent for "All construction employees employed by the Company in the province of Ontario in all sectors of the construction industry, other than the ICI sector, save and except non-working foremen and persons above the rank of non-working foreman" – Counsel sought assistance regarding how the issue underlying the proceeding (that is, the overlap of bargaining rights) ought to be resolved – The Board held the issues of overlapping bargaining rights would best be dealt with by way of an application asserting there has been a violation of section 73 of the LRA – The Board directed the CCWU to file the application, noting the panel of the Board assigned to that proceeding can determine whether section 73 applies in the circumstances, and, if so, it can fashion a remedy to resolve the overlap of bargaining rights – Application adjourned *sine die*

MTN GENERAL CONTRACTING INC., MTN FORMING INC.; RE: Allied Construction Employees, Local 1030, United Brotherhood of Carpenters and Joiners of America; RE: Canadian Construction Workers' Union; OLRB File No. 3180-13-G; Dated March 14, 2014; Panel: Lee Shouldice; R. O'Rourke and A. Haward (4 pages)

Public Sector Labour Relations Transition Act – The Board was asked by ONA to determine whether the North Simcoe Muskoka CCAC's decision to stop contracting with the VON and to award nursing services to a new entity (CTE) constitutes a health services integration, making the PSLRTA applicable to the transaction – The change in service provided was triggered by a Ministry of Health and Long-Term Care initiative for a new model for the provision of nursing services – NSMCCAC argued that the initiative did not drive the shift in provider; the issue was poor performance by the VON – The Board considered the interpretation of the legislative language, including "integration" and "restructuring," as well as the interplay between the *Local Health System Integration Act* and PSLRTA – The Board held that the loss of a contract due to poor performance issues is not a health services integration; however, if the purpose of a transaction is to consolidate services as part of a broader plan to enhance the provision of services or increase efficiency, that could

constitute a "health services integration" within the meaning of PSLRTA – Although the shift from VON to CTG was undertaken in the context of discussions regarding a "future vision" for the provision of health care, PSLRTA does not apply – ONA's application dismissed

NORTH SIMCOE MUSKOKA COMMUNITY CARE ACCESS CENTRE; RE: Ontario Nurses' Association; Re: Victorian Order of Nurses et al; OLRB File No. 1378-12-PS; Dated March 21, 2014; Panel: Brian McLean (12 pages)

Certification – Construction Industry – Reconsideration – Quinlan sought reconsideration of the Board's decision which found that an employee, W, was not employed in horticulture and consequently was not exempt from the operation of the LRA – The Board rejected the first ground for reconsideration, namely that the Board erred in accepting LIUNA's submissions over Quinlan's without requiring proof of those submissions – The Board stated that the question before it was argued on an agreed statement of facts, part of which provided that the Board could rely on the facts in the agreed statement – On the second ground, Quinlan challenged the Board's calculation of W's hours worked in landscaping because it mistakenly included hours for snow removal and construction – The Board allowed the request for reconsideration on this ground, but found that the re-calculation did not affect the original result – Clarifying the "significant time and effort" test as a "majority of time" test, the Board found that W did not spend more than half his working hours performing duties related to horticulture – Reconsideration denied

QUINLAN INC.; RE: Labourers' International Union of North America, Local 625; OLRB File No. 1489-13-R; Dated March 27, 2014; Panel: Lee Shouldice (pages 9)

Unfair Labour Practice – UNITE HERE complained that Richtree refused to provide the union with the names and contact information, current benefits, and job descriptions of its Eaton Centre employees – The Employer responded that it had filed an application to judicially review the Board's earlier finding that the union's bargaining rights applied to the Employer's new location in the mall and the Board should delay or defer consideration of the present application until the review was heard – The Board saw no reason to postpone this application as the judicial review had not been perfected and no date for its hearing had been set – On the merits, the Board applied its earlier jurisprudence in *Millcroft Inn* to find that Richtree's conduct had the effect of interfering with the union's representation rights and undermined the union in the eyes of its members – Application granted

RICHTREE MARKETS/NATURAL MARKETS GROUP; RE: UNITE HERE local 75; OLRB File No. 2978-13-U; Dated March 25, 2014; Panel: John D. Lewis (8 pages)

Practice and Procedure – Settlement - Summons to Witness – The Board quashed three summonses that the applicant had issued and served to compel three employer witnesses to attend a settlement meeting with a Labour Relations Officer – The Board held that while the Summons to Witness encompasses consultations and hearings on its face, it is neither necessary nor appropriate to summons a witness where no oral or written evidence on oath will be presented

SHANDIZ NATURAL FOODS; RE: United Food and Commercial Workers Union, Local 175; OLRB File Nos. 2366-13-U; 2850-13-U; Dated March 26, 2014; Panel: Roslyn McGilvery (3 pages)

COURT PROCEEDINGS

Judicial Review – Practice and Procedure – Related Employer – The applicant sought judicial review of three procedural and one substantive Board decisions – On the procedural issues, the Court found that the Board was reasonable (1) in the notice period given to the parties, (2) in its application of the Board's travel policy and the handling of the applicant's request for an adjournment, and (3) in dealing with the union's request for production (the substantive issue, a charter challenge to the onus provisions in sections 1(5) and 69(13) was abandoned) – Application dismissed

BUR-MET CONTRACTING LTD. ET AL; RE: Carpenters District Council et al; RE: Ontario Labour Relations Board; OLRB File No.3893-11-R; Court File No. 424/13; Dated March 25, 2014; Panel: Gordon RSJ, Lederman and Kiteley JJ. (5 Pages)

The decisions listed in this bulletin will be included in the publication Ontario Labour Relations Board Reports. Copies of advance drafts of the OLRB Reports are available for reference at the Ontario Workplace Tribunals Library, 7th Floor, 505 University Avenue, Toronto.

Pending Court Proceedings

Case name & Court File No.	Board File No.	Status
LIUNA - Rudyard; Zzen Divisional Court No. 485/13	0318-13-R	Pending
Richtree Markets Inc. Divisional Court No. 31/14	1768-13-U	Pending
2218783 Ontario Inc. Divisional Court No. 13-DV-0133 **(Brampton)**	2872-12-ES	Pending
Jefferson Mendonca Divisional Court No. 478/13	2146-10-U 0006-13-R	Pending
DH General Contracting Inc. Divisional Court No. 13-DV-1966 **(Ottawa)**	1820-12-R 3025-12-G	Abandoned March 25, 2014
Neivex et al. Divisional Court No. 416/13	0441-13-R	Pending
Merc Electrical Limited Divisional Court No. 437/13	0452-13-G	Pending
Sysco Fine Meats of Toronto a division of Sysco Canada Inc Divisional Court No. 414/13	3484-11-R	Pending
Godfred Kwaku Hiamey Divisional Court No. 345/13; 346/13	2906-10-U 3568-10-U	Pending
Gate Gourmet Canada Inc. Divisional Court No. 276/13	3688-11-U	June 12, 2014
Biggs & Narciso Construction Services Inc. Divisional Court No. 181/13	1307-10-R	Dismissed January 30, 2014 Reasons to Follow
Weihua Shi Divisional Court No. 158/13	0273-10-ES	Seeking Leave to SCC
Durval Terciera, et al Court of Appeal No. C 58059 & C58146	1475-11-U	September 11, 2014 (Court of Appeal)
Bur-Met Construction Divisional Court No. DC-12-010	3893-11-R	Dismissed March 25, 2014
IBEW, Local 894 Divisional Court No. 321/12	3174-09-U	Heard-March 26, 2014 Reserved
EllisDon Corporation Court of Appeal	0784-05-G	Pending CA

SMW v. EllisDon Court of Appeal		Pending CA
EllisDon Corporation Divisional Court No. 309/12	2076-10-R	Pending
Hassan Hasna Divisional Court No. 83/12	3311-11-ES	Pending
Rainbow Concrete Industries Limited Divisional Court No. 925/13 M43026	2692-06-ES	Dismissed; Seeking Leave to CA
John McCredie v. OLRB et al Divisional Court No. 1890/11 **(London)**	1155–10–U	Pending
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 213/11	0816–10–U 0817–10–U	Dismissed; Seeking Motion to set aside
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 383/10	0290–08–U 0338–08–U	See above
Dr. Peter A. Khaiter v. OLRB et al Divisional Court No. 431/08	4045–06–U et al	See above

NOTICE TO COMMUNITY

Construction Industry Grievances
Schedule of Fees

PLEASE TAKE NOTICE that the filing and hearing fees for s. 133 construction industry grievances are expected to increase within the next few months. Please watch the Board's website for the date these changes will come into force.

Filing fees will be $250 per party
Hearing Day fees will be $625 per party, per day

A new fee will be introduced for Case Management Hearing days: $250 per party.

HST will continue to apply to Hearing Days and Case Management Hearing Days.

All funds collected are remitted to the Consolidated Revenue Fund of the Province of Ontario.

Rule 31.1 will be amended (see below) to reflect the changes after the Cabinet approves the Order in Council.

RULE 31 FEES

31.1 The following fees, exclusive of all applicable taxes, are payable in respect of a proceeding under section 133 of the Act:

(a) The fee payable by the referring party for filing a Referral of Grievance of Arbitration (Construction Industry) with the Board is $250.00.

(b) The fee payable by each party for filing a Request for Hearing and Notice of Intent to Defend/Participate (Construction Industry Grievance Referral) with the Board is $250.00.

(c) The fee payable by each party is $250 per day of case management hearing or part of such a day scheduled by the Board.

(d) The fee payable by each party is $625.00 per hearing day or part of such a day scheduled by the Board.